

FEDERAL COURT OF AUSTRALIA

Klychev v Minister for Immigration and Border Protection [2016] FCA 1356

Appeal from: *Klychev & Ors v Minister for Immigration & Anor* [2016] FCCA 1211

File number: NSD 937 of 2016

Judge: **KATZMANN J**

Date of judgment: 15 November 2016

Catchwords: **MIGRATION** — Partner (Temporary) (Class UK) Visa — Tribunal refused to grant visa because not satisfied of genuine relationship between primary visa applicant and sponsoring spouse — whether primary judge erred in rejecting any of several grounds of review — whether Tribunal misconstrued or misapplied the law — whether Tribunal failed to take into account relevant evidence or considerations — whether Tribunal's finding that there had been no genuine relationship between primary applicant and sponsor was irrational or illogical — whether appellants denied a fair hearing because Tribunal did not adjourn hearing after isolated angry outburst against migration agent — whether reasonable apprehension of bias

Legislation: *Migration Act 1958* (Cth) ss 12, 65, 351, 476
Federal Court of Australia Act 1976 (Cth) ss 24, 27

Cases cited: *Attorney-General (NSW) v Quin* (1990) 170 CLR 1
Branir v Owston Nominees (No 2) Pty Ltd (2001) 117 FCR 424
Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd (1976) 135 CLR 616
Craig v South Australia (1995) 184 CLR 163
Da Costa v Cockburn Salvage & Trading Pty Ltd (1970) 124 CLR 192
Galea v Galea (1990) 19 NSWLR 263
Htun v Minister for Immigration and Multicultural Affairs (2001) 233 FCR 136
Kedem v Johnson Lawyers Legal Practice Pty Ltd [2014] FCAFC 3
Michael Wilson & Partners Ltd v Nicholls (2011) 244 CLR 427

Minister for Immigration and Border Protection v SZSSJ
[2016] HCA 29; 333 ALR 653

Minister for Immigration and Border Protection v WZARH
(2015) 256 CLR 326

Minister for Immigration and Citizenship v SZMDS (2010)
240 CLR 611

Minister for Immigration and Multicultural Affairs v Yusuf
(2001) 206 CLR 323

*Minister for Immigration, Local Government and Ethnic
Affairs v Hamsher* (1992) 35 FCR 359

Minister of Immigration and Citizenship v SZRKT (2013)
212 FCR 99

Plaintiff S157/2002 v Commonwealth of Australia (2003)
211 CLR 476

Re Refugee Review Tribunal; Ex parte Aala (2000) 204
CLR 82

*SLMB v Minister for Immigration & Multicultural &
Indigenous Affairs* [2004] FCAFC 129

SZNV v Minister for Immigration and Citizenship [2010]
FCA 261

*VFAB v Minister for Immigration and Multicultural and
Indigenous Affairs* (2003) 131 FCR 102

*WAEE v Minister for Immigration and Multicultural and
Indigenous Affairs* (2003) 236 FCR 593

Warren v Coombes (1979) 142 CLR 531

Date of hearing:	3 November 2016
Registry:	New South Wales
Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	77
Counsel for the First Appellant:	The First Appellant appeared in person.
Counsel for the First Respondent:	Ms R Graycar
Solicitor for the First Respondent:	Sparke Helmore
Counsel for the Second	The Second Respondent filed a submitting notice.

Respondent:

ORDERS

NSD 937 of 2016

BETWEEN: **SAGYNBEK KLYCHEV**
 First Appellant

NAZIRA KLYCHEVA
Second Appellant

INDIRA KLYCHEVA (and another named in the Schedule)
Third Appellant

AND: **MINISTER FOR IMMIGRATION AND BORDER**
 PROTECTION
 First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

JUDGE: **KATZMANN J**

DATE OF ORDER: **15 NOVEMBER 2016**

THE COURT ORDERS THAT:

1. 1. The appeal be dismissed.
2. 2. The appellants pay the first respondent's costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

KATZMANN J:

1 1 Sagynbek Klychev is a Kyrgyzstani national who, sponsored by an Australian citizen, arrived in Australia with his three children on 18 November 2010. At the time he held a Prospective Marriage Visa (Subclass 300). That is a visa which allows the holder to enter and remain in Australia for up to nine months (after which the holder may apply for a partner visa): *Migration Regulations 1994* (Cth), Sch 2 cl 300.511. On 25 December 2010 Mr Klychev married his sponsor. Less than two months later, however, on 10 February 2011, the sponsor left Australia for Kyrgyzstan and did not return for three years. Nevertheless, on 20 May 2011 Mr Klychev applied for a Partner (Temporary) (Class UK) Visa (“Temporary Partner Visa”).

2 2 Section 65 of the *Migration Act 1958* (Cth) provides that if the Minister is satisfied that an applicant for a visa has satisfied the criteria for that visa he must grant the visa but, if not, he must refuse to do so. The criteria for the grant of a Temporary Partner Visa are set out in Pt 820 of Sch 2 to the Regulations. They include both primary and secondary criteria. If Mr Klychev, as the primary applicant, satisfied the primary criteria, his children would only need to satisfy the secondary criteria: see Sch 2 cl 820.3.

3 3 The primary criteria for the Temporary Partner Visa are to be found in Div 820.2 of the Regulations. Some must be satisfied at the time of the application, others at the time of the decision. The primary criteria to be satisfied at the time of the application are the criteria set out in cl 820.21. They include cl 820.211, which relevantly provides:

(1) The applicant:

- (a) is not the holder of a Subclass 771 (Transit) visa; and
- (b) meets the requirements of subclause (2), (5), (6), (7), (8) or (9).

...

4 4 Mr Klychev, who was separated from the sponsor at the time of his application, claimed that he satisfied the requirements of subcl (8). Subclause (8) states:

An applicant meets the requirements of this subclause if:

- (a) the applicant is the holder of a Subclass 300 (Prospective Marriage) visa; and
- (b) the applicant has married the sponsoring partner under a marriage that is recognised as valid for the purposes of the Act; and

- (c) the relationship between the applicant and the sponsoring partner has ceased; and
- (d) any 1 or more of the following:
 - (i) the applicant;
 - (ii) a member of the family unit of the applicant who has made a combined application with the applicant;
 - (iii) a dependent child of the sponsoring partner or of the applicant or of both of them;

has suffered family violence committed by the sponsoring partner.

5 5 Section 12 of the Act states that “[f]or the purpose of deciding whether a marriage is to be recognised as valid for the purposes of this Act, Part VA of the *Marriage Act 1961* applies as if section 88E of that Act were omitted”. The Tribunal accepted that there was a valid marriage.

6 6 Mr Klychev contended that his three children had been assaulted by his estranged wife.

7 7 It was not in dispute that in order to establish the condition in para (c) — that the relationship between the applicant and the sponsoring partner had ceased — it was first necessary to establish that there was a genuine spousal relationship in the first place. Section 5F of the Act provides:

- (1) For the purposes of this Act, a person is the *spouse* of another person if, under subsection (2), the 2 persons are in a married relationship.
- (2) For the purposes of subsection (1), persons are in a *married relationship* if:
 - (a) they are married to each other under a marriage that is valid for the purposes of this Act; and
 - (b) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and
 - (c) the relationship between them is genuine and continuing; and
 - (d) they:
 - (i) live together; or
 - (ii) do not live separately and apart on a permanent basis.
- (3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.

(Emphasis in original)

8 8 Regulation 1.15A of the Regulations includes the following provisions for determining whether two persons are in a spousal relationship with each other:

- (1) For subsection 5F(3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F(2)(a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
...
(d) a Partner (Temporary) (Class UK) visa;
the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and

- (ii) the length of time during which the persons have lived together; and
- (iii) the degree of companionship and emotional support that the persons draw from each other; and
- (iv) whether the persons see the relationship as a long-term one.

...

9 On 21 December 2011 a delegate of the Minister decided to refuse to grant the visa because he was not satisfied that Mr Klychev had been in a genuine and continuing relationship with the sponsor.

10 The Klychevs applied to the Migration Review Tribunal (the functions of which are now performed by the Administrative Appeals Tribunal) (“Tribunal”) for a review of that decision but the Tribunal affirmed the decision. The Klychevs then applied to the Federal Circuit Court under s 476 of the Act for constitutional writs quashing the Tribunal’s decision and requiring either the Tribunal or the Minister to determine the application “according to law” (“the judicial review application”). The primary judge made orders dismissing the application with costs and the family appeals against his judgment and orders. The appeal is without merit.

The Tribunal’s decision

11 The Tribunal determined that the criterion in s 5F(2)(a) was met, and then considered the criteria in subs (2)(b)–(d).

12 The Tribunal found that there was no evidence that Mr Klychev and his wife had any shared financial relationship. It was not satisfied on the evidence that they had lived together or shared a household together or that they had been recognised by others as being in a genuine married relationship. Nor was it satisfied that they had been committed to any long-term relationship or had provided companionship or emotional support to each other. Its conclusions are neatly summarised at [74] of the decision record:

The Tribunal has considered all the evidence both individually and cumulatively. Although the applicants and the applicant’s friends have provided statements in support of the application, there is little documentary or independent information which provides support to the claims made by the applicant. The only photos provided of the applicant and the sponsor together was (*sic*) on the day of their wedding. This is despite it being claimed that there were other photos taken, but these have all now been destroyed. There is no documentation which would indicate the sponsor ever notified any organisation, including Centrelink, that she was living with the applicant in his home in Auburn. The very abrupt end of the claimed

relationship after it was claimed that he had previously been positive and harmonious also calls into question the genuineness of that relationship.

13 In the result, the Tribunal was not satisfied that Mr Klychev and his wife had been in a genuine spousal relationship and consequently determined that there was no relationship that ceased. For this reason, and in the absence of information to indicate that Mr Klychev met any of the alternative criteria in cl 820.321, the Tribunal affirmed the decision under review.

The proceeding below

14 The Klychevs' application raised five grounds, each of which was rejected by the primary judge.

15 **The first ground** was pleaded as follows:

The [Tribunal] misconstrued and misapplied the law.

Particulars

- i. The [Tribunal] misconstrued and misapplied, section 5F of the Migration Act 1958 (Cth), regulation 1.15A of the Migration Regulations 1994 (Cth) (Regulations) and clause 820.211(8) of Schedule 2 of the Regulations.

16 The particular error or errors of construction or application were not disclosed in the application. Despite the pleading, apparently based on the submissions that were put to him, the primary judge treated this ground as raising a complaint that the Tribunal failed to deal with the matters required by reg 1.15A(3), because there was no evidence before the Tribunal in respect of those matters.

17 The primary judge held (at [14]) that the Tribunal was not required to have regard to a consideration under reg 1.15A(3) if there was no evidence going to that consideration, because each of the considerations in the regulation was qualified by the word "any" (for example, "any joint ownership of real estate ..."). The primary judge noted that Mr Klychev ultimately conceded this point, and his Honour considered it fatal to the first ground.

18 **The second ground** was that the Tribunal failed to take into account certain considerations made relevant by reg 1.15A, namely:

Financial aspects of the relationship

- Any joint ownership of any major assets

- • The extent of any pooling of financial resources
- • The basis of any sharing of day-to-day household expenses
-
- Nature of the household
- • Any joint responsibility for the care and support of children
- • Any sharing of responsibility for housework
-
- Social aspects of the relationship
- • The basis on which the persons plan and undertake joint social activities
-
- Nature of the persons' commitment to each other
- • The length of time during which the persons have lived together
- • The degree of companionship and emotional support that the persons draw from each other
-

19 19 The primary judge considered that this second ground was essentially the same as the first and failed for the same reason.

20 20 **The third ground** was that the Tribunal failed to take into account credible and relevant evidence concerning “all of the circumstances of the relationship”. This ground was particularised as follows:

- i. There was evidence before the Tribunal as to various factors set out in regulation 1.15A.
- ii. In the premises, the Tribunal failed to consider the evidence, to which reference is made in the previous paragraph.

21 21 The primary judge found that the Tribunal had in fact considered all of this evidence and that its conclusion was open on the material before it (at [20]–[24]).

22 22 **The fourth ground** pleaded that the Tribunal’s finding that there was no relationship was irrational, illogical or not based upon findings or inferences of fact supported by logical grounds.

23 23 The primary judge found (at [27]) that the submissions in support of this ground amounted to no more than an attack upon the merits of the Tribunal’s decision.

24 24 At [29]–[32] the primary judge noted that an additional complaint was raised under the fourth ground at hearing. The focus of the complaint was that the Tribunal had observed (at [49] of its reasons) that “[t]here [was] no documentation to show that the sponsor had

notified any authorities that she was now living at the address in Auburn”, yet the marriage certificate, which was before the Tribunal, did in fact record the sponsor’s address as the address in Auburn. The primary judge noted that this could be understood as a finding that was not open on the evidence. But he concluded that, when [49] was read with [74] of the Tribunal’s reasons, it was apparent that “[w]hat was important to the Tribunal was not that the sponsor had not told anybody about an address in Auburn, but rather, about a change of address”, and that “[t]he marriage certificate did not indicate any change of address”.

25 25 **The fifth and final ground** arose from an incident at the hearing in which the Tribunal member voiced his frustration with the appellants’ migration agent. The frustration arose because the agent had brought witnesses to the hearing without providing outlines of their evidence to the Tribunal beforehand. This provoked criticism of the agent’s apparent lack of preparation for the hearing. The appellants alleged that the criticism of the migration agent led to a denial of procedural fairness because:

- (1) (1) the Tribunal failed to adjourn the proceedings to give them time to prepare their case and this meant that they had not had a fair hearing; and
- (2) (2) there was a reasonable apprehension of bias.

26 26 The primary judge rejected the fair hearing sub-ground for three reasons: *first*, because no application had been made to adjourn the hearing (at [37]); *secondly*, because “[t]here was no issue critical to the review that might have been more effectively dealt with had there been an adjournment”; and *thirdly*, because “there was no cogent or any other argument as to why there should be an adjournment” (at [39]).

27 27 The primary judge rejected the bias sub-ground because “[i]nsofar as the Tribunal revealed frustration with the agent, that frustration was limited to the effect of the agent’s conduct on the Tribunal’s ability to properly prepare for the hearing” and “there was no direct attack on the agent which resulted in, or could be seen possibly to result in, the rejection of any of the evidence relied upon by the applicant” (at [42]). Insofar as the appellants had sought to support their claim by reference to certain passages in the Tribunal’s reasons, the Tribunal held (at [44]) that the reasons were of no assistance as they disclose the findings at the end of the process of review (relying on *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at [33] and [67]).

The appeal

28 28 The appellants, who were represented by solicitor and counsel in the court below, commenced this appeal without legal representation. They remain unrepresented. Their notice of appeal does not identify any error on the part of the primary judge. Indeed, with one exception, it merely reproduces verbatim the grounds pleaded in the judicial review application.

29 29 The appellants' written submissions were brief. They relied on the submissions made in the court below. They also attached the documents which they had sought to tender in the court below but which had been rejected, at the same time acknowledging that the solicitor and barrister who had acted for them in the Circuit Court proceeding had advised them that no new evidence could be introduced "irrespective of how good it is to support [their] case". In oral argument, which, to the extent that it was relevant, addressed only the additional ground, Mr Klychev claimed to be baffled by the advice and he was plainly frustrated with and distressed by his predicament. He said that he had a sense that his family had been dealt with unjustly. He pleaded with the Court to believe him and to give his family a chance.

30 30 This appeal is brought under s 24 of the *Federal Court of Australia Act 1976* (Cth). It is an appeal in the nature of a rehearing: *SLMB v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 129 at [11]. A rehearing is not a new hearing at which the original application is determined without regard to what happened in the court from which the appeal is brought and without regard to its findings: *Da Costa v Cockburn Salvage & Trading Pty Ltd* (1970) 124 CLR 192 at 208–10; *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 619; *Kedem v Johnson Lawyers Legal Practice Pty Ltd* [2014] FCAFC 3 at [73]. Unless the appellate court accedes to an application to exercise its power to receive further evidence (see *Federal Court of Australia Act 1976* (Cth), s 27), it is limited to the evidence adduced in the court below.

31 31 The task of a court on an appeal by way of rehearing is the correction of error: *Branir v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 ("*Branir*") at [20]–[21] (Allsop J, Drummond J and Mansfield J agreeing at [1] and [2] respectively). When the majority in *Warren v Coombes* (1979) 142 CLR 531 at 552–3 said that an appellate court on a rehearing must not shrink from giving effect to its own conclusion, it was referring to a conclusion that the decision of the trial judge was wrong and requires correction: *Minister for Immigration, Local Government and Ethnic Affairs v Hamsher* (1992) 35 FCR 359 at 369; *Branir* at [21].

32 As the appellants are unrepresented, however, they should not be held strictly to their pleading. It is appropriate to treat grounds 1–5 inclusive as amounting to allegations that, to the extent that the primary judge did not find those grounds made out, his Honour was wrong. Several of the grounds overlapped.

33 I turn first to grounds 1 and 2.

34 The allegation in **ground 1** that the Tribunal had misconstrued and misapplied the law, as developed in the appellants' written submissions in the Circuit Court and pressed upon this Court, was based on the notion that the Tribunal failed to consider certain matters related to the financial and social aspects of the relationship, the nature of the household, and the commitment Mr Klychev and his sponsor had to each other. The written submissions referred to the delegate but, since it was the Tribunal's decision which was under review and not the delegate's, the primary judge correctly took the reference to the delegate to be a reference to the Tribunal. The appellants said that there was no evidence of some of the matters listed in reg 1.15A(3): in relation to the financial aspects of the relationship, joint ownership of real estate or other major assets ((a)(i)) and the pooling of financial resources ((a)(iii)); in relation to the nature of the household, any joint responsibility for the care and support of children ((b)(i)) or any sharing of the responsibility for housework ((b)(iii)); in relation to the social aspects of the relationship, any basis on which the persons plan and undertake joint social activities ((c)(iii)); and in relation to the nature of their commitment to each other, the length of time during which they had lived together.

35 The primary judge was right to point out that the requirement to take the matters listed in reg 1.15A(3) into account depends on whether there is evidence of those matters. If there was no evidence, then there was nothing to take into account. For this reason the primary judge correctly dismissed ground 2. But I do not understand that that was the purport of ground 1 or, if it was, that it was the only complaint the appellants were making about the Tribunal's decision. I acknowledge that the submissions are somewhat confusing, but it seems to me that they complain that the Tribunal did not deal with each of the matters listed in reg 1.15A(2), despite evidence in relation to some, if not all, of them. With respect to the financial aspects of the relationship the Klychevs submitted that there was evidence that:

- 0 • Mr Klychev and his sponsor desired to open a joint bank account;
- 1 • they shared the unit in which they lived, although it was rented in Mr Klychev's name only;

- 2 • the sponsor was receiving a Centrelink pension; and
- 3 • Mr Klychev was in paid employment.

36 36 None of these matters, however, would answer the description of any of the items listed in reg 1.15A(3)(a)(i)–(v). Moreover, they say nothing about any financial aspect of the relationship. In any event, the Tribunal expressly referred to all of them (at [9] and [46]).

37 37 The appellants also submitted that there was evidence of the following matters, which they said bore on the nature of the household:

- 4 • that Mr Klychev lived with the sponsor in Chester Hill for 12 weeks when he first arrived in Australia;
- 5 • that the sponsor had her belongings in the home until she moved out;
- 6 • that after living in Chester Hill, Mr Klychev, his children, and the sponsor moved to a flat in Auburn;
- 7 • that Mr Klychev said that he, the sponsor, and the children were renting and living in that flat;
- 8 • that the lease for the Auburn flat was in Mr Klychev's name;
- 9 • that it was rented a week after Mr Klychev arrived in Australia;
- 10 • that the landlord was a Chinese lady;
- 11 • that Mr Klychev first lived at Chester Hill;
- 12 • that the sponsor's son collected her belongings a couple of days after the "incident";
- 13 • that Mr Klychev's son gave evidence of the living arrangements;
- 14 • that he also gave evidence that the sponsor took her clothes with her and of an assault; and
- 15 • that an AVO was taken out.

38 38 While at least some of these matters were relevant to the nature of the household, they did not bear on regs 1.15A(3)(b)(i) or (iii) and only some of them touched upon the living arrangements of the appellants and the sponsor. Anyway, several of them were mentioned in the Tribunal's reasons, for example, at [15], [45] and [48] (that they lived together at Chester Hill and then in Auburn, that the lease for the flat in Auburn was in Mr Klychev's name, and

that the landlord was a Chinese lady), at [9], [17], [29]–[32] and [61] (the evidence from Mr Klychev’s children of assaults by the sponsor), and at [9], [61] and [72] (the application for the AVO).

39 39 The appellants further submitted that there was evidence concerning the social aspects of the relationship which the Tribunal did not consider, namely that:

- 16 • friends visited Mr Klychev and his wife and they spent time with “each other”;
- 17 • one friend had photos but changed phones (and that was why they could not be produced);
- 18 • the friend visited the home “many times” as they lived near each other;
- 19 • friends attended the wedding;
- 20 • friends in the community help each other;
- 21 • friends visited Mr Klychev and the sponsor in their home;
- 22 • one of them had known the sponsor since 2000;
- 23 • Mr Klychev and his wife went to the Opera House and the city;
- 24 • he had no photos of social activities;
- 25 • nevertheless Mr Klychev gave evidence of other joint social activities (visiting friends together, celebrating Australia Day on the beach, going to the movies, the zoo, shopping together with the children, dining at restaurants with each other and sometimes with the children).

40 40 But the Tribunal referred to the evidence from the friends at [54], [55], [66]–[69] and [74]. The Tribunal also mentioned the visit to the Opera House at [19], attendance at or participation in social activities at [55], and the absence of photos of social activities at [57]. It discounted the evidence from the friends, however, because it doubted their impartiality. At [69] the Tribunal said:

The close-knit nature of the Kyrgyzstan community in Sydney calls into question the impartiality of the information provided by these witnesses. Although their evidence did support the claims of the applicant of being in a genuine relationship with the sponsor, this must be balanced against the lack of any documentary or other information which would support those claims. It must also be balanced against the other information which would indicate that the parties were not in a genuine relationship at any time.

41 Finally, with respect to the commitment of Mr Klychev and his sponsor to each other, the appellants submitted that there was evidence that:

- 26 • the sponsor did not work when they lived at Chester Hill but cleaned the home and did the household chores;
- 27 • the sponsor moved out of the home on the day of the conflict;
- 28 • the sponsor had belongings in the home before moving out;
- 29 • she had mental problems and was a patient at Cumberland Hospital;
- 30 • one of the witnesses said it was a genuine relationship;
- 31 • their initial plans were “the usual plans, to live and raise children”; and
- 32 • Mr Klychev and the sponsor married a month after arriving in Australia to strengthen their relationship and make it official.

42 I fail to see how all these matters were indicative of the sponsor’s commitment to her husband. In any event, the Tribunal referred to the claims that the sponsor did not do paid work during the relationship (at [46]), that she moved out of home on the day of the alleged conflict and that she left belongings behind when she did so (at [50]), that she had mental problems and had been a patient at Cumberland Hospital (at [35] and [66]), and that the reason for the marriage so soon after arrival in Australia was to strengthen the relationship (at [20]). It also referred to the evidence of “witnesses” to the effect that other members of the Kyrgyzstani community considered the relationship genuine (at [55]).

43 The Tribunal did not advert to Mr Klychev’s evidence that when they first married they had the “usual plans to live, to raise our children”, but the evidence was vague, undeveloped, and uncorroborated.

44 While it would seem that the primary judge misconstrued the first ground, there is no indication that the Tribunal misconstrued or misapplied the law. An administrative decision-maker is not obliged to refer to every piece of evidence: see, for example, *WAEE v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 236 FCR 593 at [46]. Certainly a failure to do so does not, without more, signify a misconstruction or misapplication of the law. There must be an error of law which causes the Tribunal to ignore relevant evidence (*Craig v South Australia* (1995) 184 CLR 163 at 179) or the Tribunal must

have ignored relevant material in a way that affects the exercise of its power (*Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82]–[84]). As the Full Court said in *WAEF*, there is a distinction between the Tribunal failing to advert to evidence which, if accepted, might have led it to make a different factual finding (which, without more will not lead to jurisdictional error), and a failure by the Tribunal to address a contention which, if accepted might establish that the applicant satisfied a criterion for the grant of a visa. I accept that in some cases a failure to consider evidence may be indicative of jurisdictional error, such as where it involves the failure to consider a claim (*Htun v Minister for Immigration and Multicultural Affairs* (2001) 233 FCR 136) or cogent corroborative evidence (as in *Minister of Immigration and Citizenship v SZRKT* (2013) 212 FCR 99). This case, however, is not one of them.

45 45 In **ground 3** the appellants allege that the Tribunal failed to take into account credible and relevant evidence touching upon the factors listed in reg 1.15A. The particulars of this ground were that:

- i. There was evidence before the Tribunal as to various factors set out in regulation 1.15A.
- ii. In the premises, the Tribunal failed to consider the evidence, to which reference is made in the previous paragraph.

46 46 It is apparent that this complaint is identical in substance with the argument advanced in support of the first ground of appeal. There was, however, a twist to it advanced in the written submissions below, which was based on the additional evidence ruled inadmissible by the primary judge. The gist of the submission was that the evidence before the Tribunal was sufficient to satisfy it of the various factors going to the genuineness of the relationship and, “with the additional evidence, there was sufficient material to satisfy the Court”.

47 47 The appellants submitted that the additional evidence was sufficient to satisfy the Tribunal in respect of each of the matters listed in reg 1.15A, for the following reasons:

- i. Financial aspects:
 - The Fact that Centrelink benefits were paid to the spouse is credible.
 - The fact that the Tenancy for the ... Auburn, property was in the name of the Applicant is credible.
- ii. Nature of the household
 - [Mr Klychev] and the spouse lived first at Chester Hill for 12 weeks and thereafter at ... Auburn.

- • The spouse's belongings were at the ... Auburn apartment and collected by her son.
- • There was credible evidence of the assault and the AVO.
- • The additional evidence of the library card address and the police record address corroborates the evidence before the delegate [presumably this should read "Tribunal"].
- iii. Social aspects of the relationship
 - • The evidence of [Mr Klychev], his family and friends about their socialising, social outings is credible.
- iv. Nature of the commitment to each other
 - • [Mr Klychev] and the spouse lived in Chester Hill and ... Auburn as a family. The spouse had mental problems and had been a patient at Cumberland Hospital prior to the assault and AVO which is credible evidence of the basis for the parting the ways by the spouse and the Applicant.

48 48 As I have already observed, in so far as there was evidence touching upon these matters, the Tribunal had regard to it. The credibility of the evidence was a matter for the Tribunal and the Tribunal alone. The Tribunal was not bound accept it. Furthermore, as the primary judge observed, none of the evidence upon which the appellants relied as pointing to "the financial aspects of the relationship" was concerned with that subject. In his Honour's words, "[t]he fact that two people share a unit is neither financial nor necessarily indicative of a relationship". I would add that neither is the fact that the sponsor was receiving a Centrelink pension nor that Mr Klychev was in paid employment necessarily indicative of a relationship. The point the Tribunal made about these matters (at [46]) was that there was no evidence that the moneys were paid into the couple's joint names or that Mr Klychev deposited any of his income into his wife's account or she any of her pension into his.

49 49 The submissions on this ground do not disclose any jurisdictional error. In substance, they amount to no more than an attack on the merits of the decision.

50 50 In **ground 4** the appellants complain that the Tribunal's finding that there had been no marital relationship was "irrational, illogical and not based upon findings or inferences of fact supported by logical grounds". The written submissions in support of this ground were that certain inferences "could reasonably have been made" and that on the basis of the evidence before it, it was open to the Tribunal to find that there was a relationship. That may well have been so, but it is beside the point. The question was not whether different inferences could reasonably have been drawn from the evidence but whether it was unreasonable as a matter

of law to come to any other conclusion. In *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [131], Crennan and Bell JJ said that:

the test for illogicality or irrationality must be to ask whether logical or rational or reasonable minds might adopt different reasoning or might differ in any decision or finding to be made on evidence upon which the decision is based. If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion.

51 51 Apparently at the hearing below the appellants' counsel argued that on the evidence before it the Tribunal could not conclude that the relationship between Mr Klychev and his sponsor was not genuine. The primary judge correctly rejected the argument, observing (at [28]):

Even if it were the case, which it was not, that the Tribunal accepted that the applicant had lived with the spouse in Australia as claimed, the mere fact that the spouse left Australia on 10 February 2011 and did not return for 3 years when the applicant had only been in Australia for 1½ months was, of itself, sufficient to justify the conclusion that there had never been a genuine relationship between them.

52 52 I interpolate that the evidence was to the effect that during and after that three-year period there was no contact of any kind between them.

53 53 The primary judge continued:

Absent some compelling (and accepted) explanation, a newly reunited and recently married couple is unlikely to separate so quickly and for so long. There was no such explanation in this case. In light of that, it cannot be said that the Tribunal's decision was not one at which no reasonable person could have arrived on the material before the Tribunal: *Minister for Immigration & Citizenship v SZMDS* (2010) 240 CLR 611; [2010] HCA 16 at [130]–[133] (Crennan and Bell JJ).

54 54 The evidence concerning the assaults on the children might provide an explanation. The Tribunal did not (at least expressly) reject the evidence that they had occurred. But the occurrence of the assaults did not compel a finding that up until that point the relationship between the couple had been a genuine marital relationship.

55 55 Ground 4 should be dismissed.

56 56 **Ground 5** is the procedural unfairness ground.

57 57 As pleaded, this ground as based on an exchange between the Tribunal member and the appellants' migration agent in which the member took the agent to task for failing to provide witness statements in advance of the hearing.

58 58 In their written submissions in the court below, however, the appellants submitted:

33 In assessing credibility of the Applicants and witnesses, the Tribunal erred by misconstruing their demeanour, whose culture is other than Anglo-Celtic. The Applicants and witnesses possess cultural background whereby during the course of the hearing, they engaged in gratuitous concurrence with the Tribunal, by avoiding direct disagreement with it, in order to avoid conflict. Such gratuitous concurrence ensued when various propositions, namely that they may not be truthful, had been put to them (Paragraph 69 of Reasons, page 14 of Affidavit of AO'D).

34 The Applicant's evidence includes an oral extract of the hearing before the delegate. The tone of the delegate and his comments reveal an aggressive approach and attitude to the Applicants. Because of the cultural background of the First Applicant and his family, it is understandable that they appeared to agree with propositions put to them by the delegate.

Presumably the references to the "delegate" were intended as references to the Tribunal.

59 59 These submissions did not address either of the points raised in the application for review, which are revived on this appeal. The particulars of procedural unfairness that appear in both the application and the notice of appeal are in the following terms:

Hearing Rule

- i. The [Tribunal] identified the case as not being prepared prior to hearing.
- ii. Despite this, the [Tribunal] proceeded to hear the case and did not adjourn the case.
- iii. In the circumstances, the [Tribunal] ought to have adjourned the case to give [Mr Klychev] a fair hearing and the opportunity to present a prepared case.

Bias Rule

- iv. The [Tribunal] expressed criticism of and disbelief at certain aspects of [Mr Klychev's] evidence, or lack thereof.
- v. In so doing, the [Tribunal] displayed perceived bias against [Mr Klychev].

60 60 The primary judge rejected the proposition that the failure to adjourn the hearing was a denial of procedural fairness because:

- 33 • no application for an adjournment was ever made;

- 34 • there was no suggestion that an adjournment would have achieved anything;
- 35 • the Tribunal's opinion that the agent was not prepared for the hearing was confined to his failure to provide written statements and the witnesses gave evidence at the hearing;
- 36 • there was nothing to show that the witnesses were prevented from saying in evidence everything that they had to say in support of the application for review; and so
- 37 • there was no practical unfairness in the Tribunal proceeding with the hearing; and
- 38 • for the same reasons it was not unreasonable of the Tribunal not to adjourn the hearing.

61 61 The reference to practical unfairness was an allusion to the following observations of Gleeson CJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1 at [37]:

Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.

62 62 Gleeson CJ's remarks were picked up by the seven justices of the High Court in their joint judgment in *Minister for Immigration and Border Protection v SZSSJ* [2016] HCA 29; 333 ALR 653 at [82]:

63 [C]ompliance with an implied condition of procedural fairness requires the repository of a statutory power to adopt a procedure that is reasonable in the circumstances to afford an opportunity to be heard to a person who has an interest apt to be affected by exercise of that power. The implied condition of procedural fairness is breached, and jurisdictional error thereby occurs, if the procedure adopted so constrains the opportunity of the person to propound his or her case for a favourable exercise of the power as to amount to a "practical injustice".

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65 63 As Gageler and Gordon JJ explained in *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326 at [57], "[t]he absence of practical injustice in *Lam* lay in the fact that '[t]he applicant lost no opportunity to advance his case'; it was not

‘shown that he lost an opportunity to put any information or argument to the decision-maker, or otherwise suffered any detriment’”. That is precisely the position in the present case.

64 The primary judge was correct to find that there was no practical injustice here.

65 The allegation of apprehended bias is not made out either. The primary judge applied the correct legal test and did not err in the conclusion he reached.

66 The Tribunal was understandably critical of the appellants’ migration agent who had turned up to the hearing with a number of witnesses but had not forwarded statements from them in advance. The Tribunal had asked for documents to be provided at least seven days before the hearing. Indeed, as the Minister frankly acknowledged, the Tribunal clearly showed its frustration and impatience with the agent. The relevant passages of the transcript are set out in the primary judge’s reasons, the recording of that part of the hearing was played in the court below, and the primary judge listened to the rest of the recording in chambers.

67 I also listened to the audio recording of the hearing. Having done so, I am satisfied that the allegation that the Tribunal took an “aggressive approach and attitude to the conduct of the [appellants]” is unfounded. The Tribunal was aggressive at one point, but only towards the migration agent, and it reflected the member’s exasperation with the preparation of cases by migration agents more generally. What is more, the aggression was short-lived. Even if directed to a party, a passing display of bad temper will not give rise to a reasonable apprehension of bias: *Galea v Galea* (1990) 19 NSWLR 263 at 279–80 (Kirby A-CJ); *VFAB v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 131 FCR 102 at 126–7 (Kenny J). See, too, *SZNVN v Minister for Immigration and Citizenship* [2010] FCA 261 at [31]. Here, in his questioning of the appellants and their witnesses the Tribunal member was courteous and temperate. He informed Mr Klychev that his frustration with the agent would not affect his assessment of the claim and I do not see how it is possible that a fair-minded layperson might reasonably come to a different conclusion. It follows that I respectfully agree with the primary judge’s conclusion that “the [member] spoke in a moderate tone of voice, was never harsh or aggressive and gave no indication that [he] was either unwilling or unable to bring an impartial mind to the consideration of the review”. Moreover, as the primary judge pointed out, the test of apprehended bias (whether a fair-minded lay observer might reasonably apprehend that the decision-maker might not bring an impartial and unprejudiced mind to the resolution of the question to be decided) requires the articulation of a logical connection between the conduct of the matter relied on and the feared

deviation from the course of deciding the case on its merits: *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427 at [63]. It is not apparent how the criticism of the migration agent, no matter how it was expressed, could, without more, provide that connection.

70 68 I should add that there is no evidentiary foundation for the submission that the answers to any of the questions can, let alone, should be attributed to the cultural background of the witnesses. The notion advanced in the submission is therefore entirely speculative.

71 69 The new ground, **ground 6**, is in the following terms:

The Tribunal failed to allow compelling new material in support of the existence of the “relationship” (i.e. that the sponsor ever notified any organisation that she was living with the applicant in his home in Auburn) to be admitted into evidence.

72 70 Notwithstanding the terms in which it is pleaded, however, ground 6 relates to the rejection of evidence by the primary judge. The evidence in question is identified in the appellants’ submissions as copies of the police record of the complaints made by Ruslan and Nazira against the sponsor and the AVO application, the sponsor’s library record, the marriage certificate, and various unidentified photographs. At the hearing of the appeal Mr Klychev submitted that the library and police records were genuine, insisted that he had been truthful throughout, and lamented the fact that he had been disbelieved. He urged me to believe him:

For me, a simple person, a father of three, it seems that ignoring those documents is, to a degree, unjust. The legal niceties are totally above my head. It’s that we did have a family in the full meaning of the word. Please believe me. Give my family a chance. My children are already used to this way of life and bringing them back to a country where Islam is worshipped, I am terrified of that. It’s dangerous ... I was unable to persuade the representatives of the court and the tribunal. At the moment, you are my last hope.

73 71 The primary judge’s decision to decline to receive the evidence was not placed before the Court. The appeal book, which was prepared by the Minister’s solicitors, included a heavily redacted affidavit sworn by Mr Klychev on 1 April 2016 and another sworn on 6 October 2015, filed by his solicitor in the court below. The redacted parts had been obliterated. An affidavit, filed for the Minister on 14 October 2016, reveals that the redactions were made by the solicitor with carriage of the matter on behalf of the Minister on the basis of her contemporaneous file note of the primary judge’s ruling. She states that the evidence was not admitted because it was not relevant to the proceedings. Another affidavit

sworn by the appellants' solicitor, Igor Kazagrandi, on 7 April 2016, which was filed in support of the judicial review application but which was not received into evidence, was omitted in its entirety from the appeal book. In the light of ground 6, which the Minister rightly took to be a complaint about the primary judge's evidentiary rulings, it is difficult to understand why the affidavits as filed were not in the appeal book and why the Minister did not include in the appeal book or as an annexure to his solicitor's affidavit those parts of the transcript where the application to tender the evidence was made and the ruling given. Be that as it may, the appellants did not dispute the statements made in the affidavit of the Minister's solicitor and the difficulty with the redacted documents was overcome at the hearing by the Minister handing up copies of the original affidavits.

74 72 This ground of appeal must be rejected.

75 73 First, the appellants' stated purpose in having the documents admitted into evidence was to overcome a perceived deficiency in the evidence before the Tribunal of documentation showing that the sponsor and the appellants lived at the same address. The photographs, however, could not have served that purpose as there is no evidence to indicate where they were taken. In any case all but one of them was in evidence before the Tribunal, as was the marriage certificate.

76 74 Second, as the appellants were advised by their own lawyers, none of the evidence was admissible in the judicial review application. It was not admissible because it was not relevant. It could only be relevant if the Circuit Court had jurisdiction to decide whether the factual findings were wrong and had the power to make findings of fact itself. Yet, the Circuit Court's jurisdiction is a very narrow one. It has no jurisdiction to inquire into the correctness of the factual findings and therefore no power to decide whether those findings were right or wrong. The decision of the Tribunal can only be reviewed for jurisdictional error: *Migration Act, s 474; Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476. While a failure to accord procedural fairness to a party is a jurisdictional error (*Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82), the appellants' complaint was not that the Tribunal denied them procedural fairness because it did not admit the evidence. They did not tender the evidence to the Tribunal, although they had ample opportunity to do so. They proffered the evidence to the court below to cure a perceived defect in their case identified by the Tribunal in its reasons. Even if the primary judge were hearing an appeal,

rather than deciding an application for judicial review, this would be no basis to admit the evidence.

77 75 It is, of course, possible that the Tribunal mistook the true facts. If so, however, it was not open to the primary judge to rectify the mistake. Nor can it be corrected on appeal to this Court. It is therefore beside the point whether I believe Mr Klychev or not. Brennan J succinctly explained the legal position in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35–6, picked up by the joint judgment of the seven justices of the High Court in *Minister for Immigration and Border Protection v SZSSJ* [2016] HCA 29; 333 ALR 653 at [81]:

The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

78 76 Accordingly, the primary judge did not err in refusing to admit the additional evidence and so this ground of appeal must be rejected, too. If the appellants are able to persuade the Minister that they are truly victims of an administrative injustice and if the Minister considers that it is in the public interest to do so, the Minister may be able to cure it in the exercise of his power to substitute a more favourable decision for the decision of the Tribunal (see s 351). This Court, however, like the court below, is powerless to do so.

Conclusion

79 77 The appellants have been unable to establish any error on the part of the primary judge. It follows that the appeal must be dismissed. Costs should follow the event. I will make orders to this effect.

I certify that the preceding seventy seven (77) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Katzmann.

Associate:

Dated: 15 November 2016

SCHEDULE OF PARTIES

NSD 937 of 2016

Appellants

Fourth Appellant:

RUSLAN KLYCHEV